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STATE OF WASHINGTON

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No. 43947-6-II

COURT OF APPEALS, DIVISION II,  
FOR THE STATE OF WASHINGTON

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LINDA KALASH,

Respondent,

v.

DEPARTMENT OF EMPLOYMENT SECURITY,

Appellant.

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**RESPONDENT MS. KALASH'S OPENING BRIEF**

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## A. INTRODUCTION

Ms. Linda Kalash began work as a “food specialist” for La Petite Academy in Covington on August 19, 2010. CP Comm. Rec.68, Finding of Fact (“FF”) 1.<sup>1</sup> She was dissatisfied with the limited hours and the commute, so she began to look for other work. CP Comm. Rec.68, FF 2. She found another job at KinderCare and resigned. CP Comm. Rec.18-19.

A Commissioner’s Review Judge later found as fact, that Ms. Kalash ***“was offered a position as a cook with KinderCare, to begin May 31, 2011. The job description and the rate of pay were established; the hours were to be 35-40 hours per week. Claimant gave the interested employer [La Petite Academy] notice on May 16, 2011 that her last day would be May 27, 2011.”*** However, after she resigned, again according to the Commissioner’s findings, the ***“job offer was revoked.”*** CP Comm. Rec.84 (emphasis added).

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<sup>1</sup> Thurston County Superior Court has transmitted the Administrative Record, aka Certified Appeals Board Record, in this matter as a single, stand-alone document; that Record is separately paginated so references in this brief to that record will appear as “CP Comm. Rec.,” meaning “Clerk’s Papers Commissioner’s Record.” All other references to the Clerk’s Papers will be in standard citation format, “CP,” with reference to the page number as it appears on the Superior Court Clerk’s Papers Index.

On appeal for unemployment benefits, she argued that her job separation fit exactly the statutory definition of a “good cause” to quit for a “bona fide job offer.” Holding that Ms. Kalash had an obligation to rescind her resignation from La Petite once the KinderCare<sup>2</sup> job fell through and had an obligation to “exhaust” alternatives to quitting – two requirements that do not exist in the statute or its regulations – the Commissioner denied her benefits. CP Comm. Rec. 84-86.

On Ms. Kalash’s appeal for judicial review, the Hon. Thomas McPhee of the Thurston County Superior Court reversed the ESD, finding that Ms. Kalash had resigned for “good cause” due to a bona fide job offer under the plain language of the statute. CP 39-42.

The ESD appealed. CP 45-50.

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<sup>2</sup> Though this business is spelled variously in the record, the business itself appears to use the spelling KinderCare, which will be used in this brief unless quoted material spelled it differently.

## B. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The Superior Court correctly reversed the Commissioner's Order<sup>3</sup> because the Commissioner erred in holding that Ms. Kalash did not have "good cause" to quit her job. CP Comm. Rec. 86.
2. The Superior Court correctly reversed the Commissioner's Order because the Commissioner erred in holding, without any statutory basis, that Ms. Kalash had a legal obligation to rescind her resignation. CP Comm. Rec. 84 (adopting ALJ's Conclusion of Law 7 and Finding of Fact 5<sup>4</sup> at Comm. Rec. 71); 86.
3. The Superior Court correctly reversed the Commissioner's Order because the Commissioner held, without any statutory authority, that Ms. Kalash had a legal obligation to exhaust all reasonable alternatives to quitting *after she had quit*. CP Comm. Rec. 84 (adopting ALJ's Conclusion of Law 7 at Comm. Rec. 71); 86.

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<sup>3</sup> While the final decision maker is actually a Review Judge, sometimes referred to as the "Commissioner's Delegate," who is appointed by the Commissioner's Review Office of the Employment Security Department, for simplicity sake the Order under review will be referenced in this brief merely as the Commissioner's Order.

<sup>4</sup> Because the Commissioner adopted Conclusion of Law 7 and Finding of Fact 5, although modifying them, Ms. Kalash specifically assigns error each.



4. The Superior Court correctly reversed the Commissioner's Order because the Commissioner erred in adopting the ALJ's "credibility" finding concerning the legal basis for Ms. Kalash's claim for unemployment benefits. CP Comm. Rec. 85-86 (adopting ALJ's Conclusion of Law 7 at Comm. Rec. 71).
5. Ms. Kalash is entitled to attorney's fees and costs upon this Court's affirming of the Superior Court's order which reversed the ESD's Commissioner's Order.

#### **Issues Pertaining to Assignments of Error**

1. Under the Employment Security Act's "good cause" to quit provisions, should the Superior Court's Order be affirmed (and the Commissioner's Order be reversed) when Ms. Kalash did not quit her job with La Petite until after receiving a bona fide job offer from KinderCare? (Issue Pertaining to Assignments of Error 1-4).
2. Should the Superior Court's Order be affirmed (and the Commissioner's Order be reversed) when the Commissioner adopted the ALJ's conclusions of law that Ms. Kalash had an obligation to rescind her resignation after the job offer was

revoked and had an obligation to exhaust reasonable alternatives to quitting after she had quit? (Issue pertaining to Assignments of Error 1 – 3)

3. Should the Superior Court's Order be affirmed (and the Commissioner's Order be reversed) when the Commissioner adopted the ALJ's conclusion of law that Ms. Kalash was not "credible" because she had only argued that she had "good cause" to quit based on a bona fide job offer *after she had retained legal counsel*? (Issue pertaining to Assignment of Error 4).
- 4.. Should attorney fees and costs be awarded to counsel for Ms. Kalash for work on this case when the fees and costs are reasonable and when the Commissioner's denial of benefits to Ms. Kalash was correctly reversed by the Superior Court? (Issue Pertaining to Assignment of Error 5).

**C. STATEMENT OF THE CASE**

**1. JOB SEPARATION**

Ms. Linda Kalash began work as a "food specialist" for La Petite Academy in Covington on August 19, 2010. CP Comm. Rec.17; 68, Finding of Fact ("FF") 1. Eventually she grew dissatisfied with the limited hours and the commute distance, but she did not quit until another employer, KinderCare, hired her. CP Comm. Rec.18, 20, 22; CP Comm. Rec. 68, FF 2.

She testified under oath that she quit her job at La Petite Academy to take a job with KinderCare in Bremerton:

ALJ: Did you quit this job?

Ms. Kalash: Yes, I did.

ALJ: At the time you quit, did you have any other employment promised to you elsewhere?

Ms. Kalash: Yes, I did.

ALJ: **Did you quit this job to take that other job?**

Ms. Kalash: **Yes, I did.**

ALJ: Who was that other job with?

Ms. Kalash: It was with Kindercare in Bremerton, Washington.

\* \* \*

ALJ: Were you hired there before you gave notice that you were quitting at La Petite?

Ms. Kalash: Yes, I was.

ALJ: Who hired you?

Ms. Kalash: Jill Metcalf, director of Kindercare.

CP Comm. Rec.18 (emphasis added).

But the job at KinderCare fell through:

ALJ: Did you start working for Kindercare?

Ms. Kalash: No.

ALJ: Why not?

Ms. Kalash: Because the day – the night before my last day of work, I received a phone call and Jill told me that the cook decided to stay after her two weeks' notice and so, therefore, **I would have to wait for a position for a teacher or if she didn't work out**, because she had already given notice. Then she would try to work me in.

CP Comm. Rec.20 (emphasis added).

Ms. Kalash found herself unemployed. An ALJ later asked her why she did not get her old job back:

ALJ: Did you talk to anyone at La Petite about that, about possibly getting your job back?

Ms. Kalash: I didn't speak with anyone about it. **I felt that I had already trained someone for the kitchen and my job was not there.**

CP Comm. Rec.20 (emphasis added).

Moreover, La Petite did not offer her a job. CP Comm.

Rec.16.

The doubtful ALJ continued his questioning:

ALJ: ...was your primary reason for quitting to take this job at Kindercare?

Ms. Kalash: Yes, that was my primary reason.

CP Comm. Rec.22.

The employer confirmed that Ms. Kalash resigned after receiving a job offer from KinderCare and then told the employer that she was resigning due to taking a position at KinderCare. Further, the employer agreed it had received a "reference check from Kindercare . . ." CP Comm. Rec.28-29. The employer also agreed La Petite Academy had replaced Ms. Kalash after her resignation. CP Comm. Rec. 31.

Finding she was unemployed, Ms. Kalash applied for unemployment benefits – without advice of counsel. CP Comm. Rec.50-57. She applied well after her resignation from La Petite Academy and well after the job at KinderCare had fallen through "because they told me at Kindercare that they hoped that there would be an opening soon . . . ." CP Comm. Rec.32.

## 2. PROCEDURAL HISTORY

The ESD denied benefits and Ms. Kalash appealed, after which she was able to retain counsel. CP Comm. Rec.68. After the appeal hearing, an ALJ made the following finding of fact – quoted here exactly as it appears in the order:

At hearing, claimant alleged for the first time, that she quit her job with employer in order to accept work elsewhere. Claimant went on to alleged [sic] that on May 13,2011, [sic] the director of the Bremerton KinderCare to begin [sic] on May 31, 2011. Claimant contended that the hours and days, and rate of pay and job description were established at the time the offer was made. Claimant contends that she accepted the offer on the date it was made.

CP Comm. Rec.69, FF 5.

The ALJ then made a conclusion of law stating, in pertinent part, as follows:

The claimant's pre-adjudication statements to the department, made at a time when events were fresh in her recollection and before she was aware of the effect they might have on her claim, were that she quit due to the commute; the failure to get a transfer; and, a reduction in hours. Then, after having been denied benefits, claimant contends she quit in order to accept a bona fide offer of work. **Her pre-adjudication statements are entitled to be given great weight when considering claimant's contentions at hearing.** . . . The undersign [sic] finds the belated assertions of the claimant at hearing not credible. . . Lastly, it is noted that the claimant **did not attempt to rescind her resignation** when informed, before her last day of employment, that KinderCare had revoked its offer to her. Had she done so she would have been retained by the

employer. Claimant therefore **failed to exhaust all reasonable alternative** [sic] available short of quitting.

CP Comm. Rec.71, Conclusion of Law 7 (emphasis added).

The Commissioner adopted Finding of Fact 5 and Conclusion of Law 7, as well as all the other findings and conclusions of the ALJ and affirmed the denial of benefits. CP Comm. Rec.84, 86. But the Commissioner made additional findings of fact:

On May 31, 2011, ***claimant was offered a position as a cook with KinderCare, to begin May 31, 2011. The job description and the rate of pay were established; the hours were to be 35-40 hours per week. Claimant gave the interested employer [her former employer] notice on May 16, 2011 that her last day would be May 27, 2011.***  
Exhibit No. 7, p. 1.

On May 26, 2011, KinderCare's [sic] director contacted claimant and advised her that the individual she was to replace rescinded her resignation ***and claimant's job offer was revoked***. Nevertheless, claimant continued with her decision to quit her job with the interested employer. Claimant's last day with the interested employer was May 27, 2011.

CP Comm. Rec.84 (emphasis added).

The Commissioner also reached additional conclusions of law:

Because the claimant continued with her decision to quit work with the interested employer after her new job offer was revoked, ***she did not quit because of a bona fide job offer***. Indeed, as credibly testified to at hearing, the

interested employer would have continued to employ the claimant after May 27, 2011, ***if claimant had asked to rescind her resignation.***

CP Comm. Rec.85. And further:

[W]e agree, in essence, with the administrative law judge and find and conclude that the claimant's testimony was not credible as to the reason for her quit.

CP Comm. Rec.86.

The Superior Court reversed the ESD, holding the ESD erred in misapplying and misinterpreting the good cause quit provisions of the Employment Security Department because Ms. Kalash did not quit her job until she had a "bona fide job offer" of another job. The State now appeals.<sup>5</sup> CP 45-50.

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<sup>5</sup> Per the Court of Appeals, Division II's General Order 2010-1, the respondent files the opening brief in administrative review cases.



**D. ARGUMENT**

- 1. BECAUSE MS. KALASH QUIT HER JOB ONLY AFTER RECEIVING A BONA FIDE JOB OFFER OF ANOTHER JOB, SHE QUIT FOR GOOD CAUSE UNDER THE PLAIN LANGUAGE OF THE STATUTE.**

No dispute exists that Ms. Kalash had a bona fide job offer: she resigned her position at La Petite when she was offered another position at KinderCare. Indeed, the Commissioner's Order here makes that job offer and its revocation a finding of fact. CP Comm. Rec. 84. Ms. Kalash had other reasons for being dissatisfied with her job, but she did not quit until she had a bona fide job offer. The statute and regulation pertaining to bona fide job offers carry no requirement that a claimant offer to rescind a resignation if the bona fide job offer falls through and carry no requirement that a claimant "exhaust" alternatives to quitting after quitting for a bona fide job offer. Ms. Kalash therefore should have qualified for unemployment benefits because she resigned after receiving a bona fide job offer that was then revoked.

The Commissioner's Order to the contrary was therefore correctly reversed by The Hon. Thomas McPhee of the Thurston County Superior Court because the Commissioner erred in denying

Ms. Kalash benefits for not meeting legal requirements that do not exist.

The Commissioner is not free to make up statutory or regulatory requirements, but is confined to what the Legislature and the agency have already created: a simple rule that resigning one job after receiving a bona fide job offer of another job is “good cause” under the statute:

An individual has “good cause” to quit and to qualify for unemployment benefits when

- (i) He or she has left work to accept a bona fide offer of bona fide work . . .

RCW 50.20.050(2)(b)(i).

The regulation pertaining to quitting for a “bona fide job offer” states as follows:

**If you leave work to accept a bona fide offer of employment, you will have good cause** within the meaning of RCW 50.20.050 if you satisfactorily demonstrate that:

- (1) Prior to leaving work, you received a definite offer of employment; and
- (2) You had a reasonable basis for believing that the person making the offer had the authority to do so; and
- (3) A specific starting date and the terms and conditions of the employment were mutually agreed upon; and

(4) You continued in your previous employment for as long as was reasonably consistent with whatever arrangements were necessary to start working at the new job; and

(5) The new job is in employment covered by Title 50 RCW or the comparable laws of another state or the federal government.

WAC 192-150-050 (emphasis added).

Though the ALJ in this case avoided doing so, the Commissioner made a specific finding of fact that shows that each of these ESD regulatory requirements is met in this case:

On May 31, 2011, ***claimant was offered a position as a cook with KinderCare, to begin May 31, 2011. The job description and the rate of pay were established; the hours were to be 35-40 hours per week. Claimant gave the interested employer [her former employer] notice on May 16, 2011 that her last day would be May 27, 2011.***  
Exhibit No. 7, p. 1.

On May 26, 2011, KinderCare's [sic] director contacted claimant and advised her that the individual she was to replace rescinded her resignation ***and claimant's job offer was revoked.*** Nevertheless, claimant continued with her decision to quit her job with the interested employer. Claimant's last day with the interested employer was May 27, 2011.

CP Comm. Rec.84 (emphasis added).

Thus, prior to leaving her job at La Petite, Ms. Kalash (1) received a definite offer of another job at KinderCare; (2) she (and the Commissioner) had a reasonable basis to believe the person

offering the job, the director at KinderCare (CP Comm. Rec.18), had authority to make the offer; (3) the terms and conditions were agreed upon, and there was a definite start date, May 31, 2011; (4) she gave notice that her last day would be May 27, and her "last day" was indeed May 27. Matching the Commissioner's findings with the ESD's regulation shows Ms. Kalash met every requirement of leaving work for a bona fide job offer.

That is the extent of "the law" pertaining to quitting for a bona fide job offer and nowhere in this law is a requirement that if the bona fide job offer falls through, one must offer to rescind one's resignation from the prior job. Nor is there an "exhaustion" requirement in "bona fide job offer" cases, as there is an "exhaustion" requirement for other "good cause" reasons. In fact, it would be absurd to have an exhaustion requirement concerning a bona fide job offer: how is a person who is offered a new job supposed to "exhaust" alternatives to quitting the old job? By refusing the new job? Even if this exhaustion "requirement" were not absurd, it simply is a misstatement of the law.

Therefore, Ms. Kalash had "good cause" to quit due to a bona fide job offer and she should have received unemployment benefits when that offer fell through. The Commissioner's Order to

the contrary should be reversed based simply on applying the plain language of the statute and regulation to the Order's own findings of fact.

Given those findings – essentially that Ms. Kalash quit only after receiving a bona fide job offer - the “credibility” findings of the ALJ and Commissioner against Ms. Kalash are largely irrelevant. But they are also completely mistaken.

Making a “credibility” finding based on statements made by Ms. Kalash to the ESD prior to her receiving advice of counsel about what “the law” states regarding “good cause” quits completely undermines the entire idea of representation of counsel.

Changing one's legal theory is not a “lie,” it has nothing to do with “credibility,” it has to do with receiving expert advice from someone who knows the law and adopting an alternative legal theory. A legal theory or a legal argument or a legal conclusion can be correct or incorrect, right or wrong, but it cannot be “the truth” or a “lie.” If someone files a *pro se* complaint suing another for, as an example, tortious interference with a contract, and then consults a lawyer who amends the complaint to allege a better legal theory such as breach of contract, the plaintiff has not “lied.” The plaintiff's credibility is not at issue merely because the complaint was

amended to allege a different legal theory after the advice of counsel.

In part for this reason, most ALJ's – and for that matter Commissioner's Review Judges - pay little attention to the various questionnaires that claimants must fill out to apply for benefits, usually with no knowledge of the law of unemployment benefits and its arcane and specialized use of some terms, and usually with no advice of counsel. If claimants are locked in to statements made in those documents, then there is no reason to have a hearing at all. Nor is there reason for the claimant to have counsel.

As Judge McPhee noted in his oral decision, the Commissioner's (and ALJ's) restricting Ms. Kalash to the reasons stated in her quit questionnaire *confuses her motivations for seeking another job* with the legitimate statutory "cause" for the termination: a bona fide job offer. Ms. Kalash may have been motivated to look for other work for a variety of reasons, but she did not quit until after she had received a bona fide job offer, which is "good cause" under the Employment Security Act.

Furthermore, the ALJ's and Commissioner's Orders here completely ignore the fact that though on the "Voluntary Quit Questionnaire" she checked "No," next to "Did you quit because

you were hired for a new job?,” she nevertheless filled out the entire section about a “new job offer,” stating that there was a new job offer, the date of her resignation, the name of the person who offered her the job, and the name of the offering business – which is not KinderCare. CP Comm. Rec. 51.

So obviously she misunderstood what was being asked in this section of the questionnaire. This is one reason people seek the advice of counsel and faulting her for doing so is nothing that administrative agencies should adopt as policy. She testified with regard to that question that she didn’t “know the criteria for drawing unemployment . . . so I didn’t – I didn’t put that [the KinderCare job] down.” CP Comm. Rec.19. She repeatedly testified that she did not think the bona fide job offer mattered because she did not know about unemployment law. CP Comm. Rec. 19, 20, 21, 22.

Finally, Ms. Kalash’s “pre-adjudication” statements are wholly consistent with quitting for a bona fide job offer. She may well have been dissatisfied with the lack of hours and the commute – **but she did not quit her job until she had a bona fide job offer.** Ms. Kalash’s case is an exact fit for a “bona fide job offer” and arguing it to be so was not a falsehood. The Commissioner’s Order to the contrary and its adoption of the ALJ’s “credibility

finding" should therefore be reversed and Ms. Kalash should receive the benefits for which the ESD originally found her eligible.

The ESD's Commissioner's decision here is reviewed under the Administrative Procedure Act and will be reversed on judicial review if any one of several grounds is satisfied. RCW 34.05.570. Specifically, in the instant case, "the agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).

Issues of law are the responsibility of the judicial branch. *Tapper v. Employment Security*, 66 Wn. App. 448, 451, 832 P.2d 449 (1992), *rev'd on other grounds*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, when reviewing legal questions the court is allowed to substitute its judgment for that of the administrative agency. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 324-325, 646 P.2d 113 (1982) *cert. denied*, 459 U.S. 1106 (1983). Pure questions of law are reviewed *de novo*. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982). In resolving a mixed question of law and fact, the court first establishes the relevant facts, determines the applicable law, and applies it to the facts. *Tapper v. Employment Security Department*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).



While deference is granted to the agency's factual findings, the agency's application of the law is reviewed *de novo*. *Dermond v. Employment Security Department*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997).

Therefore, the Commissioner's Order was correctly reversed by the Superior Court because the order is an error of law: it misinterprets the bona fide job offer statute and regulation and creates requirements that do not exist and cannot be invented by those charged with applying the law that does exist properly.

**2. THE COMMISSIONER ERRED BY ARBITRARILY IMPOSING ADDITIONAL REQUIREMENTS TO SHOW GOOD CAUSE TO QUIT BEYOND THOSE DEFINED BY THE EMPLOYMENT SECURITY ACT OR ITS RELATED REGULATIONS.**

The courts will uphold an agency's interpretation of a regulation only if "it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent." *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996). "In determining legislative intent, we interpret the language at issue within the context of the entire statute." *In re Sehome Park Care Ctr, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995) *as cited in Safeway, Inc. v. Dep't of Revenue*,

96 Wn. App. 156, 160, 978 P.2d 559 (1999). If the agency's interpretation of the law conflicts with an applicable statute, the statute controls. *Id.*

To achieve its purpose, the Employment Security Act must be liberally construed in favor of the unemployed worker. RCW 50.01.010. When the legislature mandates liberal construction in favor of the worker, courts should not narrowly interpret provisions to the worker's disadvantage when the statutory language does not suggest that such a narrow interpretation was intended. *Delagrave v. ESD*, 127 Wn. App. 596, 609 (2005).

As discussed above, the "quit to follow" provisions of the statute say nothing about an obligation to revoke one's resignation if a bona fide job offer for another job falls through and say nothing about an obligation to "exhaust reasonable alternatives" to quitting when one has already quit. All that the statute requires is that a claimant left work "to accept a bona fide offer of bona fide work . . ." RCW 50.20.050(2)(b)(i). The related regulations state that a person leaving work for a bona fide job offer "will have good cause" when the person receives a definite offer of work, has a reasonable basis to believe the person offering the job has authority to do so, there is a specific starting date and agreement as to terms and

conditions of employment, and continues to work the first job as long as reasonably consistent with the arrangements for the second job, and that the second job be “covered employment” under the Act. WAC 192-150-050 (emphasis added). None of these elements are in dispute. The Commissioner’s own findings of fact show that Ms. Kalash satisfied each element:

On May 31, 2011, *claimant was offered a position as a cook with KinderCare, to begin May 31, 2011. The job description and the rate of pay were established; the hours were to be 35-40 hours per week. Claimant gave the interested employer [her former employer] notice on May 16, 2011 that her last day would be May 27, 2011.* Exhibit No. 7, p. 1.

On May 26, 2011, KinderCare’s [sic] director contacted claimant and advised her that the individual she was to replace rescinded her resignation **and claimant’s job offer was revoked**. Nevertheless, claimant continued with her decision to quit her job with the interested employer. Claimant’s last day with the interested employer was May 27, 2011.

CP Comm. Rec.84 (emphasis added). Neither statute nor regulation require that a person revoke a resignation if the bona fide job offer falls through or exhaust reasonable alternatives to quitting after already having quit. Holding Ms. Kalash to these alleged “requirements,” invented out of whole cloth by the ALJ and adopted without legal authority by the Commissioner, was an error of law and was correctly reversed by the Superior Court. Moreover,

bending over backwards to find a reason to deny Ms. Kalash benefits, as the ALJ's and Commissioner's Orders do here, is completely contrary to the liberal interpretation in favor of claimants that is to be accorded the statute.

In this case, the agency's promulgation at the Office of Administrative Hearings and by adoption at the Commissioner's Review Office can be reversed under several subsections of the Administrative Procedure Act: under RCW 34.05.570(3)(b), because creating such requirements is outside the agency's statutory authority, under 3(d) because the requirements misinterpret and misapply the law concerning quitting for a bona fide job offer, under 3(e) because a finding that Ms. Kalash failed to meet such requirements is not based on substantial evidence, and finally, under 3(i), because inventing such requirements to deny Ms. Kalash benefits was arbitrary and capricious.

**3. ATTORNEY FEES AND COSTS IN THIS CASE ARE MANDATED BY STATUTE WHEN THE COURT REVERSES A DENIAL OF UNEMPLOYMENT BENEFITS.**

A claimant who succeeds in convincing a court to reverse a denial of benefits is allowed reasonable attorney fees and costs as mandated by statute:

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits to charge or receive any fee therein in excess of ***a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed*** or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund. ***In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving an individual's application for initial determination, claim for waiting period credit, or claim for benefits.*** In other respects the practice in civil cases shall apply.

RCW 50.32.160 (emphasis added). The fees and costs contemplated in this statute are stated in mandatory terms: "such fee and the costs *shall* be payable out of the unemployment compensation administration fund." *Id.* The Rules of Appellate Procedure require that a party entitled to attorney fees make a request for those fees and provide argument for those fees in its opening brief. RAP 18.1. Alternatively, fees and costs should be awarded under RCW 4.84.350 that allows fees and costs be awarded to a prevailing party if the party "obtained relief on a significant issue that achieves some benefit" for the party.

Counsel therefore respectfully requests that upon this Court's affirming the Superior Court's Order reversing the Commissioner's Decision in this case, that attorney fees and costs be awarded under RAP 18.1 pursuant to either RCW 50.32.160 or RCW 4.84.350 in an amount to be determined by subsequent filing of an affidavit of fees and expenses as required under RAP 18.1(d).

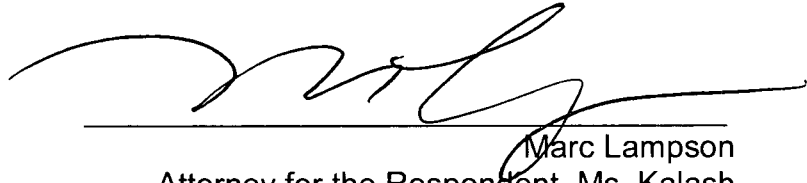
**E. CONCLUSION**

For the reasons stated above, Linda Kalash respectfully requests that this Court affirm the Superior Court's Order that correctly reversed the Commissioner's Order in this case as an error of law.

The Superior Court correctly found that the "bona fide job offer" provisions of the Employment Security Act were met and that good cause to quit was established. Counsel also requests reasonable attorney fees and costs for the time spent in bringing about an award of benefits to Ms. Kalash.

Dated this 20th day of December 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'ML', is written over a horizontal line.

Marc Lampson  
Attorney for the Respondent, Ms. Kalash  
WSBA # 14998  
1904 Fourth Ave., Suite 604  
Seattle, WA 98101  
206.441.9178

**ATTACHMENT A:**

**ALJ's Initial Order**



STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE EMPLOYMENT SECURITY DEPARTMENT

**IN THE MATTER OF:**

Linda K. Kalash

Claimant

**DOCKET NO: 04-2011-28829**

**INITIAL ORDER**

**ID:** [REDACTED]-2807 7

**BYE:** 06/30/2012

**UIO:** 770

**Hearing:** This matter came before Administrative Law Judge David G. Hansen on September 02, 2011 at Spokane, Washington after due and proper notice to all interested parties.

**Persons Present:** the claimant-appellant, Linda K. Kalash; claimant representative Molly Foster, Legal Intern; the employer, La Petite Academy Inc, represented by Nichole Crosbie; Director.

**STATEMENT OF THE CASE:**

The claimant filed an appeal on August 08, 2011 from a Decision of the Employment Security Department dated July 29, 2011. At issue in the appeal is whether the claimant voluntarily quit without good cause pursuant to RCW 50.20.050(2)(a), or was discharged for misconduct pursuant to RCW 50.20.066. Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

**Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:**

**FINDINGS OF FACT:**

1. Claimant worked for La Petite Academy Inc, employer herein, in Covington, WA from August 19, 2010, until she voluntary quit effect May 27, 2011. At the time of job separation claimant was a Food Specialist, working approximately 30 hours per week, at \$10.74 per hour.
2. As part of the process in applying for unemployment compensation claimant completed a form titled "Voluntary Quit Statement." Exhibit 4. Question 2 on that form asked the following "What was the main reason you decided to quit on that day? (Please give all the facts related to your decision)." Exhibit 4 page 1. Claimant responded "See attached letter that explains all

INITIAL ORDER - 1

reasons." Exhibit 4 Page 1. Question 3. c. asked the claimant what reasons she provided the employer for quitting. Claimant responded as follows: "Cut hours, did not get transfer as promised, can't afford to drive 100 miles each work day, plus toll fees." Exhibit 4 Page 1.

3. The form also ask claimant "Did you quit because you were hired for a new job?" Exhibit 4 Page 2. Claimant answered "No."

4. Claimant attached to the voluntary quit statement a two page, single spaced, type written document titled "Letter of explanation." Exhibit 5. At no point in the document does claimant alleged that she quit her job with employer to accept a bona fide offer of employment else where.

5. At hearing, claimant alleged for the first time, that she quit her job with employer in order to accept work elsewhere. Claimant went on to alleged that on May 13, 2011, the director of the Bremerton KinderCare to begin on May 31, 2011. Claimant contended that the hours and days, and rate of pay and job description were established at the time the offer was made. Claimant contends that she accepted the offer on the date is was made.

6. On Thursday, May 26, 2011, claimant contends she received a call from the KinderCare's director indicating that the employee she was going to replace had rescinded their resignation and that claimant would therefore would not be working at KinderCare.

7. Claimant did not advise employer that the job offer had been rescinded. Employer's director, Nicole Crosbie credibility testified, and the undersign specifically find as fact, that had claimant requested to rescind her resignation, they would have accommodate that request as they needed employees.

8. When claimant began working for employer she resided in Covington. On or about March 5, 2011, claimant relocated to Bremerton.

9. During the weeks at issue the claimant was willing and able to accept any offer of suitable work and sought work as directed by the Department.

#### **CONCLUSIONS OF LAW:**

1. The provisions of RCW 50.20.050(2), WAC 192-150-085, WAC 192-320-070, and WAC 192-320-075 apply.

2. An individual is disqualified from receiving unemployment benefits for leaving work voluntarily without good cause. RCW 50.20.050(2)(a).

3. The Employment Security Act was enacted to award unemployment benefits to individuals

who are unemployed through no fault of their own. RCW 50.01.010. A claimant who voluntarily resigns from employment has the burden of establishing "good cause" for quitting under the statute.

4. In a voluntary quit case, the claimant bears the burden to prove by the preponderance of the evidence that he or she had "good cause" to quit employment.

5. RCW 50.20.050(2)(b) provides eleven exclusive non-disqualifying reasons to quit work:

- a. a bona fide offer of new work
- b. the death, disability, or illness of oneself or an immediate family member
- c. relocation for a spouse or domestic partner's employment
- d. protection of self or an immediate family member from domestic violence or stalking
- e. 25 percent or greater reduction in pay
- f. 25 percent or greater reduction in hours
- g. increased commute because of employer worksite change
- h. unsafe worksite conditions
- i. illegal activities at the worksite
- j. change in work duties that violates religious convictions or sincere moral beliefs
- k. beginning an apprenticeship program.

6. An individual who was simultaneously employed in full-time employment and part-time employment and is otherwise eligible for benefits from the loss of the full-time employment shall not be disqualified from benefits because the individual:

- a. Voluntarily quit the part-time employment before the loss of the full-time employment; and
- b. Did not have prior knowledge that he or she would be separated from full-time employment.

7. Applying the above to the case at hand the undersigned reaches the general conclusion

that the claimant has failed to establish, by a preponderance of the evidence, good cause within the meaning of the Employment Security Act for quitting her job with the employer. The claimant's pre-adjudication statements to the department, made at a time when events were fresh in her recollection and before she was aware of the effect they might have on her claim, were that she quit due to the commute; the failure to get a transfer; and, a reduction in hours. Then, after having been denied benefits, claimant contends she quit in order to accept a bona fide offer of work. Her pre-adjudication statements are entitled to be given great weight when considering claimant's contentions at hearing. It is therefore the undersigned's conclusion that the claimant quit due to the commute from Bremerton to Covington, a situation created by her move to Bremerton; the failure to receive a requested transfer; and a reduction in hours. The undersign finds the belated assertions of the claimant at hearing not credible. Quitting due to an increased commute of one's own doing and failure to receive a transfer do not constitute any of the 11 specific reasons RCW 50.20.050(2)(b). In regard to the decrease in hours, claimant, represented at hearing, offered no evidence that the hours were reduced by 25 percent or more. Lastly, it is noted that the claimant did not attempt to rescind her resignation when informed, before her last day of employment, that KinderCare had revoked its offer to her. Had she done so she would have been retained by the employer. Claimant therefore failed to exhaust all reasonable alternative available short of quitting.

8. RCW 50.20.010(1)(c) requires each claimant to be able and willing to work, available for, and actively seeking work. The claimant was able and willing, available, and actively seeking work during the weeks at issue, has met the requirements, and is not subject to denial under the above-cited statute and related regulations.

**Now therefore it is ORDERED:**

The Decision of the Employment Security Department under appeal is **AFFIRMED**. The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c). The claimant has not established good cause for quitting. Benefits are denied pursuant to RCW 50.20.050(2)(a) for the period beginning May 29, 2011 and thereafter for seven calendar weeks and until the claimant has obtained bona fide work in covered employment and earned wages in that employment equal to seven times his or her weekly benefit amount. ("Covered employment" means work that an employer is required to report to the Employment Security Department and which could be used to establish a claim for unemployment benefits.) **Employer:** If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021

**Dated and Mailed** on September 07, 2011 at Spokane, Washington.



David G. Hansen  
Administrative Law Judge  
Office of Administrative Hearings  
221 N. Wall Street, Suite 540  
Spokane, WA 99201-0826

**Certificate of Service**

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. MP

**PETITION FOR REVIEW RIGHTS**

This Order is final unless a written Petition for Review is addressed and mailed to:

**Agency Records Center  
PO Box 9555  
Olympia, Washington 98507-9555**

and postmarked on or before **October 7, 2011**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your Petition for Review by Facsimile (FAX). Do not mail your Petition to any location other than the Agency Records Center.

DGH:

**Mailed to the following:**

Linda K Kalash  
129 N Cambrian Ave  
Bremerton, WA 98312-4008

Claimant-Appellant

## **ATTACHMENT B:**

### **Decision of the Commissioner**

**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses postage prepaid on October 28, 2011.

R  
En. [Signature] ative, Commissioner's Review Office,  
dent Security Department

UIO: 770  
BYE: 06/30/2012

**BEFORE THE COMMISSIONER OF  
THE EMPLOYMENT SECURITY DEPARTMENT  
OF THE STATE OF WASHINGTON**

**Review No. 2011-3994**

**In re:**

**LINDA K. KALASH**  
**SSA No. [REDACTED] 2807**

**Docket No. 04-2011-28829**

**DECISION OF COMMISSIONER**

On September 30, 2011, LINDA K. KALASH, by and through Katie Hilien with the Unemployment Law Project, petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on September 7, 2011. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record, and having given due regard to the findings of the administrative law judge pursuant to RCW 35.05.464(4), we adopt the Office of Administrative Hearings' Findings of Fact and Conclusions of law subject to the following additions and modifications.

Claimant worked for the interested employer in Covington, Washington. While still employed, claimant moved for personal reasons from Covington to Bremerton, Washington, thereby creating a considerable commute for herself. Because of the cost associated with the commute, the claimant began looking for work nearer her home in Bremerton. She sought a transfer with the interested employer to its Bremerton site. When the transfer did not materialize claimant began looking for employment with other employers. On May 13, 2011, claimant was offered a position as a cook with KinderCare, to begin May 31, 2011. The job description and the rate of pay were established; the hours were to be 35-40 hours per week. Claimant gave the interested employer notice on May 16, 2011 that her last day would be May 27, 2011. Exhibit No. 7, p. 1.

On May 26, 2011, KinderCare's director contacted claimant and advised her that the individual she was to replace rescinded her resignation and claimant's job offer was revoked. Nevertheless, claimant continued with her decision to quit her job with the interested employer. Claimant's last day with the interested employer was May 27, 2011.

Because the claimant continued with her decision to quit work with the interested employer after her new job offer was revoked, she did not quit because of a bona fide job offer. Indeed, as credibly testified to at hearing, the interested employer would have continued to employ the claimant after May 27, 2011, if claimant had asked to rescind her resignation. See adopted Finding of Fact No. 7. Rather, claimant quit for personal reasons, *i.e.*, the additional cost of the commute caused by her moving from Covington to Bremerton.

Responding to the petition, having carefully reviewed the entire record in this matter, we can find no basis for setting aside the administrative law judge's ultimate decision disqualifying claimant from benefits. Claimant has not established that she quit for any of the good cause reasons at RCW 50.20.050(2)(b).

The burden of proof is upon claimant to establish entitlement to unemployment compensation. Townsend v. Employment Sec. Dep't, 54 Wn.2d 532, 341 P.2d 877 (1959); Jacobs v. Office of Unemployment Comp. & Placement, 27 Wn.2d 641, 179 P.2d 707 (1947)). Good cause for quitting must be established by a preponderance of evidence. In re Christie, Empl. Sec. Comm'r Dec.2d 262 (1976). In cases involving a separation from employment, a party's burden is simply to show by a preponderance of the evidence what more likely happened. In re Murphy, Empl. Sec. Comm'r Dec.2d 750 (1984). A preponderance of evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighed against the evidence in opposition thereto. Yamamoto v. Puget Sound Lbr. Co., 84 Wash. 411, 146 Pac. 861 (1915). In entering findings, we do not have to be persuaded beyond a reasonable doubt as to the true state of affairs, nor do we have to be clearly, cogently, and convincingly persuaded. Rather, we need only determine what more likely happened. Murphy, supra.

The administrative law judge found that claimant's testimony at hearing conflicted with her statements to the Department in her voluntary quit statement. Adopted Conclusion of Law No. 7. We must give due regard to the administrative law judge's opportunity to observe the witnesses. RCW 34.05.464(4). However, we have the ultimate responsibility to make our own independent determinations based on the record and [have] the ability and right to modify or replace an administrative law judge's findings, including findings based on witness credibility. Smith v. Employment Security Dep't, 155 Wn. App. 24, 35 n. 2, 226 P.3d 263, 268 n. 2 (2010), (emphasis supplied), citing RCW 34.05.464(4) and Regan v. Dep't of Licensing, 130 Wn. App. 39, 59, 121 P.3d 731 (2005). See also, Tapper v. Employment Security Dep't, 122 Wn.2d 397, 404-406, 858 P.2d 494 (1993).



The hearing was held by telephone with no witnesses present for the administrative law judge to observe. Having reviewed the entire record, including listening to the audio recording of the telephone hearing, and having considered all factors relevant to credibility (including, but not limited to, demeanor as detectable by telephone, consistency, logical persuasiveness and the totality of the circumstances), we agree, in essence, with the administrative law judge and find and conclude that the claimant's testimony was not credible as to the reason for her quit.

As set forth above, claimant's offer of new work had been revoked by the time she quit her employment with the interested employer. Nevertheless, she continued with her decision to quit, despite not having a new job. As such, claimant quit for reasons other than an offer of bona fide work, *i.e.*, she quit for the reasons set forth in the attachment to her "Voluntary Quit Statement." See Exhibit No. 5. Consequently, while we do not question claimant's decision or motivation in quitting her job, the fact remains that she has not established that she quit for any of the good cause reasons set forth at RCW 50.20.050(2)(b).

Now, therefore,

IT IS HEREBY ORDERED that the September 7, 2011 Initial Order of the Office of Administrative Hearings is **AFFIRMED** on the issue of the job separation. Claimant is disqualified pursuant to RCW 50.20.050(2), beginning May 29, 2011, for seven calendar weeks and until she has obtained bona fide work in employment covered by Title 50 RCW and earned wages in that employment equal to seven times her weekly benefit amount. The Initial Order is **AFFIRMED** on the issue of availability. Claimant is eligible during the weeks at issue pursuant to RCW 50.20.010(1)(c). *Employer*: If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, October 28, 2011.\*

*Rhonda J. Brown*

---

Review Judge  
Commissioner's Review Office

\*Copies of this decision were mailed to all interested parties on this date.

**ATTACHMENT C:**

**Superior Court Order**

1 ☐ EXPEDITE (if filing within 5 court days of hearing)

2 XX Hearing is set:

3 Date: August 24, 2012

4 Time: 2:00 p.m.

5 Judge/Calendar: The Hon. Thomas McPhee

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA  
2012 AUG 24 PM 2:53

BETTY J. GOULD, CLERK

ORIGINAL

8 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
9 IN AND FOR THE COUNTY OF THURSTON

10 LINDA KALASH,

11 Petitioner,

12 and

13 STATE OF WASHINGTON,  
14 EMPLOYMENT SECURITY  
15 DEPARTMENT,

16 Respondent.

Case No. 11-2-02484-6

ORDER  
Administrative Appeal

18 I. HEARING

19 This review of an administrative decision in a contested case was heard on  
20 August 24, 2012. Marc Lampson argued for the petitioner, LINDA KALASH. Dionne  
21 Padilla-Huddleston, assistant attorney general, argued for respondent, the Washington  
22 State Employment Security Department.  
23  
24  
25

Order - 1

Unemployment Law Project  
1904 Third Ave., Suite 604  
Seattle, WA 98101  
206.441.9178

1 II. NO ISSUES OF FACT

2 The review was conducted on the record of the administrative proceeding. No  
3 new evidence was offered or received, and the court has decided no issues of fact.  
4

5 III. CONCLUSIONS OF LAW

6 3.1 Jurisdiction. This court has jurisdiction for this review under RCW 50.32.120 and  
7 34.05.514.

8 3.2 Law governing review. Review is governed by RCW 34.05.570.

9 3.3 Scope of Review. The scope of review by this court is specified by RCW  
10 34.05.574 which reads in part as follows:

11 1) In a review under RCW 34.05.570, the court may (a) affirm the agency action  
12 or (b) order an agency to take action required by law, order an agency to  
13 exercise discretion required by law, set aside agency action, enjoin or stay  
14 the agency action, remand the matter for further proceedings, or enter a  
15 declaratory judgment order. The court shall set out in its findings and  
16 conclusions, as appropriate, each violation or error by the agency under the  
17 standards for review set out in this chapter on which the court bases its  
18 decision and order. In reviewing matters within agency discretion, the court  
19 shall limit its function to assuring that the agency has exercised its discretion  
20 in accordance with law, and shall not itself undertake to exercise the  
21 discretion that the legislature has placed in the agency. The court shall  
22 remand to the agency for modification of agency action, unless remand is  
23 impracticable or would cause unnecessary delay.

19 3.4 Basis for reversal: The order misinterpreted and misapplied the law. In finding  
20 that LINDA KALASH was disqualified from benefits due to quitting her job without  
21 good cause, the Commissioner misinterpreted and misapplied the law with regard to  
22 voluntary quits under the Employment Security Act; therefore, the Commissioner's  
23 Order is reversed under RCW 34.05.570(3)(d).

24 3.5 The credibility determination was  
25 arbitrary & capricious

Order - 2

3.6 The Commissioner's

imposition of additional

requirements was an error of law

Unemployment Law Project  
1904 Third Ave., Suite 604  
Seattle, WA 98101  
206.441.9178

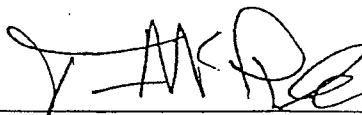
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2 **IV. JUDGMENT**

3 **4.1** The court **REVERSES** the appealed decision of the Employment Security  
4 Department, in Docket No.04-2011-28829 dated October 28, 2011.

5 **4.2** The court **ORDERS** that the Employment Security Department pay LINDA  
6 KALASH unemployment benefits to which she was qualified in accord with this  
7 decision.

8 **4.3** The court also **AWARDS** reasonable attorney fees in an amount to be  
9 determined upon filing of a cost bill subsequent to this order and under authority  
10 of RCW 50.32.160 that mandates attorney fees and costs be awarded upon  
11 reversal or modification of a Commissioner's Order.

12 DONE IN OPEN COURT THIS 24 day of AUGUST 2012.

13  
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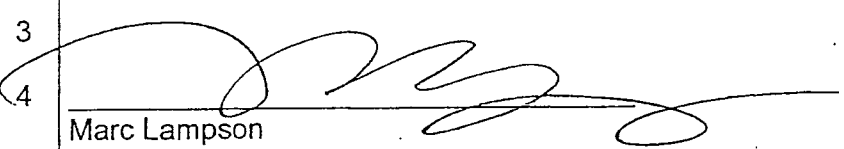
15 THE HONORABLE THOMAS McPHEE  
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2 Presented by:

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Marc Lampson  
WSBA # 14998  
Attorney for Petitioner  
Unemployment Law Project  
1904 Third Ave., Suite 604  
Seattle, WA 98101  
206.441.9178

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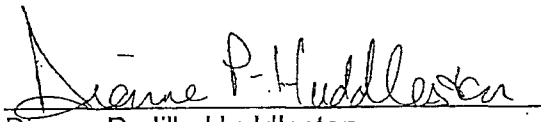
10 Approved as to form by:

11 ROB McKENNA  
Attorney General

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Dionne Padilla-Huddleston  
WSBA # 38356  
Assistant Attorney General  
Licensing & Administrative Law Division  
1125 Washington St. SE  
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360.753.2702

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Order - 4

Unemployment Law Project  
1904 Third Ave., Suite 604  
Seattle, WA 98101  
206.441.9178

FILED  
COURT OF APPEALS  
DIVISION II

2012 DEC 21 PM 1:15

STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

LINDA KALASH,

Respondent,

and

DEPARTMENT OF EMPLOYMENT  
SECURITY,

Appellant.

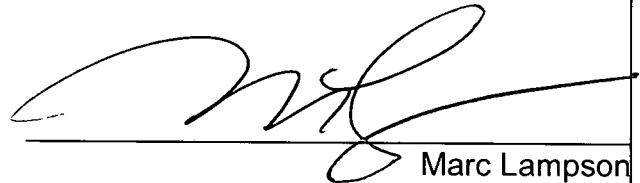
No. 43947-6-II

**CERTIFICATE OF SERVICE BY MAIL**

**CERTIFICATE**

I certify that I emailed an electronic and mailed a paper copy of the Respondent's Opening Brief in this matter on December 20, 2012, to the Respondent ESD's attorney, Dionne Padilla-Huddleston, Office of the Attorney General, 800 Fifth Ave, Suite 2000, Seattle, WA 98104-3188.

Dated this December 20, 2012.



Marc Lampson  
WSBA # 14998

Attorney for Respondent, Ms. Kalash